Supreme Court, U.S.
FILED

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No.

IN THE

Supreme Court of the United States

4-MALI LLC, PETITIONER

v.

BANKERS INSURANCE CO.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Trial Court err in refusing to grant appellant, **4-MALI L.L.C.'s** Motion for Summary Judgment, finding insurance coverage for the removal and replacement of shelves necessary for the repair and replacement of a flood damaged floor located in their leased premises under the National Flood Insurance Program policy?

2. Did the Trial Court err in granting appellee, **Banker's Insurance Company's** Motion for Summary Judgment, finding that appellant, **4-MALI L.L.C.** did not submit a timely Proof of Loss Statement, when **Bankers** made an unconditional tender for other damages with knowledge that appellant intended to seek recovery of shelf moving expenses?

PARTIES TO THE PROCEEDING

Petitioner and Writ applicant, 4 MALI, L.L.C., is a Louisiana Limited Liability Company, domiciled in Rapides Parish, Louisiana.

Defendant, Bankers Insurance Company is an insurance company writing National Flood Insurance Program Policies in Louisiana, and nationwide. Bankers is represented by Mr. Gerald Nielson and Mr. John Carter of the Nielson Law Firm in Metairie, Louisiana.

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OPINIONS BELOW

The opinion of the United States Court of Appeal for the Fifth Circuit is unpublished. (See App. 16a) The judgement of the Western District of Louisiana District Court is also not published. (App. 1a) Rehearing was denied by the U. S. Fifth Circuit. (App. 20a)

JURISDICTION

United States Supreme Court Rule 10 provides that jurisdiction is proper in this case because a Federal Court of Appeal has decided an important issue which conflicts with other Federal Courts of Appeal and this Court's earlier Rulings concerning National Flood Insurance Program (hereinafter "NFIP") claims.

Despite Bankers Insurance Company (hereinafter "Bankers") accepting and paying two additional claims for flood damage made by 4-MALI, L.L.C. (hereinafter "4-MALI") after the sixty (60) day proof of loss period, Bankers denied payment of the shelf moving expense associated with the first timely filed proof of loss made by 4-MALI. For the first time in their Motion for Summary Judgement, filed December 30, 2002, Bankers raised the issue of 4-MALI filing a timely proof of loss in this case. The flood damage occurred on June 27, 2000, and 4-MALI General Partner, Eugene P. Cicardo, Jr. filed a sworn Proof of Loss Statement on August 1, 2000, which referenced the shelf moving expenses in question, and indicated that an estimate would be provided to Bankers upon receipt. Bankers first denied that coverage under the

NFIP existed for the shelf moving expenses. Then Bankers paid $166,978.19 to 4-MALI on August 9, 2000, towards the claim, excluding the shelf moving expenses. Finally, Bankers paid $58,539.87 on October 12, 2000, to 4-MALI, again omitting the shelf moving expenses from payment. For these reasons, which are documented in the Motion for Summary Judgement filed by 4-MALI, the opposition to Bankers' Summary Judgment, the Appeal of this matter to the United States Court of Appeal for the 5th Circuit, and Request for Rehearing, it is respectfully requested that this Honorable Court overturn the lower Courts' decision, and order Bankers to pay the shelf moving expenses incurred by 4-MALI as part of their Federal Flood Damage Claim.

RELEVANT PROVISIONS

Federal Rule of Civil Procedure Article 56(c) provides in pertinent part:

> The judgement sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgement as a matter of law.

STATEMENT

Course of proceedings and disposition in the Court below

4-MALI L.L.C. (hereinafter "**4-MALI**") plaintiff and appellant herein, is the Owner and Lessor of immovable property known as the Power Center, located on MacArthur Drive in Alexandria, Rapides Parish, Louisiana. **4-MALI** filed a complaint for Damages against defendants/appellees, **Bankers Insurance Company** (hereinafter "**Bankers**") for their denial of **4-MALI**'s first party insurance coverage claim under the National Flood Insurance Program (hereinafter "NFIP"). Certain Lessees of the Power Center including Hobby Lobby, Office Depot, and the Alexandria Furniture Outlet suffered flood damage as a result of a June 27, 2000, sudden torrential rainfall.

Bankers denied **4-MALI**'s attempts to recover the cost of shelf moving expenses totaling $101,185.46 for all three stores. **Bankers** first paid **4-MALI** a total of $166,978.19 on August 9, 2000, for the first claim, submitted by 4MALI General Partner, Eugene P. Cicardo, Jr. on August 1, 2000. **Bankers** paid **4-MALI** $58,539.37 on October 12, 2000, for additional damages submitted on the Partial Proof of Loss forms, related to the same flood claim. **4-MALI** filed a Complaint for Damages in the United States District Court, Western District of Louisiana, Alexandria Division, on June 27, 2001, to recover the $101,185.46 shelf moving expenses. **4-MALI** then filed a Motion for Summary Judgment on November 26, 2002, seeking to have the flood claim covered under the NFIP, and paid by **Bankers**. **Bankers** opposed **4-MALI**'s Summary Judgment, and

filed their own Motion for Summary Judgment on January 6, 2003, asserting for the first time that **4-MALI**'s claim for shelf moving expenses was both untimely and not submitted on the proper "Proof of Loss" form. The District Court, Honorable F.A. Little Jr., granted **Bankers'** Motion for Summary Judgment, holding that **4-MALI**'s shelf moving expenses were not covered by the SFIP and that they failed to comply with the policy's proof of loss form requirements. The Court dismissed **4-MALI**'s claims, with prejudice, at their cost. **4-MALI** then appealed the District Court's ruling to the United States Court of Appeal for the Fifth Circuit, submitting Briefs on June 3, 2003. The U.S. 5th Circuit first granted Oral Argument in the matter, set for December 3, 2003. Then the 5th Circuit decided on November 24, 2003, that Oral Argument was not necessary. The U.S. 5th Circuit then rendered their decision on December 11, 2003, affirming the Trial Court's grant of **Banker's** Motion for Summary Judgement. **4-MALI**'s Petition for Rehearing was denied by the 5th Circuit on January 14, 2004.

On the date of the flood, June 27, 2000, the lease between **4-MALI,** Lessor, and its Lessees, Office Depot, Hobby Lobby, and the Alexandria Furniture Outlet stores (hereinafter "Lessees") required **4-MALI** to repair whatever damage occurred to the leased premises. After examining the Lessees' flood damaged premises, **BANKERS'** Adjuster, David Babcock, prepared the first Partial Proof of Loss form, with a net damage claim of $166,978.19, omitting the cost of removal and resetting of the contents and shelving at the Lessees' stores. This omission was pointed out to the adjuster by **4-MALI** partner, John Rino, and the approved flood remediation company, Paul Davis

Restoration Company, made a separate independent estimate for the cost of shelf removal in the amount of $101,185.46. Mr. Dirk Foster, President of Paul Davis Restoration, Co., indicated that the removal and resetting of the contents at all three Lessees' premises was necessary for his company to repair the damaged flooring.

BANKERS made a partial payment to **4-MALI** in the amount of $166,978.19, by way of check issued on August 10, 2000, for Insurance Policy No. 17000767794702, and for Claim No. 100-0011537. **4-MALI** general partner, Eugene P. Cicardo, Jr., further confirmed on August 14, 2000, with Jim Aldridge, Adjuster in **BANKERS'** Catastrophe Division that the negotiation of the first tendered check in the amount of $166,978.19 would not prohibit **4-MALI** from claiming further expenses for shelving removal. Mr. Cicardo further indicated as follows:

> "Further, we are to consider this check as an unconditional tender with no strings attached. If this is not your understanding, please notify me immediately. If I have not heard from you by noon, August 15, 2000, I will assume everything in this letter is correct and then negotiate the check with no fear that this concludes our claim."

Correspondence sent to **BANKERS** from Mr. Rino, along with the first "Partial Proof of Loss" in August 2000 indicated in lines 4 through 9 as follows:

"The attached Proof of Loss was compiled by your Adjuster. Since receiving her report, we dispute several items. We have contacted an independent to give us an estimate of cost. We note that there was no allocation for dumpster or to remove & replace contents to get to the floor. Our preliminary estimates are:

A) 2.65 per sq. ft. floor R/R carpet.

B) 2.52 per sq. ft. floor R/R tile.

C) 1.37 per sq. ft. floor R/R base molding.

D) Remove & Reset contents.

1)	Office Depot	37,424.76
2)	Alexandria Furniture	1,386.10
3)	Hobby Lobby	62,374.60
4)	Dumpster/Debris Removal	3,572.25

Upon Receipt of the estimate, same will follow."

(R. p. 78 Exh. "3")

4-MALI submitted a "Second Partial Proof of Loss" in September 2000 in the amount of $58,539.37, paid by **BANKERS** and noted on that form as follows:

> "Have filed proof for the moving of displays and shelving to replace floor. This is not reflected in these totals."

BANKER'S General Property Policy issued through the NFIP does not indicate that the removal and resetting of contents is an excluded item under the terms of the policy.

SUMMARY OF ARGUMENT

ISSUE NUMBER ONE SUMMARY OF THE ARGUMENT

Bankers failed to meet their burden of proving that no genuine issue existed on both the issue of NFIP coverage and the alleged failure of **4-MALI** to submit a proper Proof of Loss form, when **Bankers** knew that the disputed shelf moving expenses allegedly required an additional sworn Proof of Loss Statement. **Bankers** never advised **4-MALI** of the further additional form requirement, and **Bankers'** Independent Adjuster estimated a loss amount based on the shelf moving expenses.

ISSUE NUMBER TWO SUMMARY OF THE ARGUMENT

Bankers' Motion for Summary Judgment was granted in error based on **4-MALI**'s alleged failure to submit a timely Proof of Loss Statement, when **Bankers** made an unconditional tender for other damages which had been submitted after the 60 day proof of loss period, with knowledge that **4-MALI** intended to seek recovery of shelf moving expenses

known by **Bankers** within 60 days of the flood.

REASONS FOR GRANTING THE WRIT

ISSUE NUMBER ONE: Did the Trial Court err in refusing to grant appellant, 4-MALI L.L.C.'s Motion for Summary Judgment, finding insurance coverage for the removal and replacement of shelves necessary for the repair and replacement of a flood damaged floor located in their leased premises under the National Flood Insurance Program Policy?

Summary Judgment Standard

Rule 56(c) of the **Federal Rules of Civil Procedure** provides that Summary Judgment "shall be rendered forthwith if the pleadings, depositions, Answers to Interrogatories, and Admissions on file, together with the Affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to Judgment as a matter of law." The party seeking Summary Judgment bears the initial burden of informing the Court of the basis for its Motion and identifying those portions of the pleadings, depositions, Answers to Interrogatories, Admissions on file, and Affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact. *Colson v. Grohman, 174 F.3d 498, 506 (5TH Cir. 1999); Marshal v. East Carroll Parish Hosp. Serv. Dist., 134 F.3d 319, 321 (5TH Cir. 1998).*

In the Federal system, when the nonmoving party bears the burden of proof at Trial, there is no genuine issue of material fact if the nonmoving party

cannot come forward at the Summary Judgment stage with evidence of ***sufficient quantity and quality for a reasonable juror to find that the party can satisfy his substantive evidentiary burden***. *Celotex Corporation v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 91. L. Ed.2d 265 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505, 91 L. Ed.2d 202 (1986); Matsushita Electric Company v. Zenith Radio Corporation, 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986)*

In construing Summary Judgments under **Federal Rule of Civil Procedure Article 56**, the United States Supreme Court held that Summary Judgment shall be granted where the evidence is such that it would require a Directed Verdict for the moving party. *See Anderson v. Liberty Lobby, Inc., supra.* The Court in *Anderson* went on to state that if a defendant in a run of the mill civil case moves for Summary Judgment or a Directed Verdict based on the lack of proof of a material fact, the Judge must ask himself not whether he thinks the evidence unmistakably favors one side or the other, but whether a fair-minded Jury could return a verdict for the moving party on the evidence presented. The Court further opined that the mere existence of a scintilla of evidence favoring the non-moving party's position will be insufficient; that there must be evidence on which the Jury could reasonably find for the plaintiff. ***(Federal Rule of Civil Procedure Art. 56)***

A fact is ***material*** if it is essential to a non-moving party's cause of action under the applicable theory of recovery and without which that party could not prevail. Material facts are those that potentially

insure or preclude recovery, affect the litigant's ultimate success, or determine the outcome of a legal dispute.

This Court further stated that **Federal Rule of Civil Procedure**, **Article 56** does not require the moving party to negate the elements of the nonmoving party's case. Rather, **Federal Rule of Civil Procedure 56** mandates the entry of Summary Judgment, after adequate time for discovery and upon Motion against the party who fails to make a showing sufficient to establish the existence of an element essential to the party's case and on which that party will bear the burden of proof. *(See Little v. Liquid Air Corporation, 37 F.3d 1069 (5th Cir. 1994) and Fontenot v. Upjohn Company, 780 F.2d 1190 (5th Cir. 1986)).*

ANALYSIS OF THE NATIONAL FLOOD INSURANCE ACT OF 1968

Federal Law governs disputes over coverage arising under the NFIP. *(See West v. Harris, 573 F.2d 873, 880-881 (5TH Cir. 1978)).* However, Courts have held that Congress did not intend to abrogate standard insurance law principles when it enacted the NFIP. *Drewitt v. Aetna Case. & Sur. Ins., 539 F.2d 496, 498 (5TH Cir. 1976); West, 573 F.2d at p. 881; Atlas Pallet, Inc. v. Gallagher, 725 F.2d 131, 135 (1ST Cir. 1984); Nelson v. Becton, 929 F.2d 1287, 1292 (8TH Cir. 1991).* The standard principles of insurance law apply to such policies, and this Court has held that "the determination of the legal operation of the unambiguous language of [an insurance] contract is a function for the Court and not the Jury." *West v.*

Harris, 573 F.2d at p. 877, 881. The law is well settled that if the language of the policy is clear and unambiguous, it should be accorded its natural meaning. *Hanover Building Materials, Inc. v. Guiffrida, 748 F.2d 1011, 1013 (5TH Cir. 1984).*

In the case at bar, there is no specific exclusion in any portion of the **BANKERS** policy which excludes from coverage the cost of moving and resetting of contents in a flood damaged building. On the contrary, several policy provisions clearly indicate that shelving of lessee stores are "improvements" defined by Article 2 of the SFIP as follows:

> **"'Improvements' means fixtures, alterations, or additions comprising a part of the insured building."**

No portion of this definition indicates "owned" improvements are the only covered items.

Policy Section **"Article Four-Property Covered"** provides as follows:

> **"Coverage A-Building Property**
>
> This policy covers a **'building'** at the premises which is described in the application, and includes:
>
> 1) The entire building, for its real property elements, including, if owned in common by a Condominium Association, as named insured, all ***units*** within the ***building*** and the ***improvements*** within

the ***units.***"

No provision in **BANKERS** policy **Article 3-Losses Not Covered**; **Article 5-Special Provisions,** or **Article 6-Property Not Covered**, address "removal and resetting of contents" required for flood damage remediation purposes.

A simple analogy applies when a homeowner's residence floods and carpet is damaged. In order to replace the carpet, furniture would have to be moved. In this case, the furniture in question are rows of shelving located in the Lessees' stores. **BANKERS** accepted their Adjustor's estimate for floor and baseboard repair of the **4-MALI** premises because they paid $166,978.19 to **4-MALI** for replacement. **BANKERS'** claim that removal and resetting of Lessees' contents is not covered by the policy because it is not owned by the insured **4-MALI** is specious at best. No such exclusion is found in any provision of the **BANKERS** Policy. Based on correspondence dated January 11, 2001, Mr. Jim Aldridge, Claims Representative for Bankers Insurance Company, denied **4-MALI**'s claim based on a coverage opinion letter from the NFIP dated December 13, 2000. By that time the sixty day time period from the date of the flood, June 27, 2000, had run, and **4-MALI** could not file a timely Proof of Loss, according to the argument now advanced by **BANKERS**.

BANKERS had requested the opinion letter, and in a January 4, 2001, letter, Jim Aldridge "apologize[d]" to the members of **4-MALI** for their tardy response to the coverage question. In the opinion letter, Joseph Buzzelli, Claims Manager for the NFIP, stated that

"...the SFIP you issued will not pay to remove and reinstall them [shelves], even though that is necessary to make building repairs." It is clear that **BANKERS** has strained a policy interpretation to deny coverage, since no specific provision in the policy unambiguously excludes coverage. As the Court has held, standard principles of insurance law apply to the interpretation and coverage of NFIP policies, and when the language is clear and unambiguous, it should be accorded its natural meaning. In the case at bar, the removal and resetting of shelves in the Lessee stores is covered under the NFIP and **BANKERS** policy. **BANKERS** has never argued that the removal and resetting of shelves to make floor repairs is unnecessary.

As the Court is well aware, insurance policies must be strictly construed. In fact, it is well settled that if language in the policy is clear and unambiguous, it should be accorded its natural meaning, even in SFIP interpretation. *West v. Harris, 573 F.2d 873 (5TH Cir. 1978); Drewitt v. Aetna Casualty Insurety Insurance, 539 F.2d 496 (5TH Cir. 1976); Atlas Palette, Inc. v. Gallagher, 725 F. 2d 131 (1ST Cir. 1984); Nelson v. Becton, 925 F.2d 1287 (8TH Cir. 1991);* and *Hanover Building Materials, Inc. v. Guiffrida, 748 F.2d 1011 (5TH Cir. 1984).* As such, it is respectfully submitted that the claim for removal and resetting of shelving at its Lessees' premises should be covered under the NFIP, and that **BANKERS** ordered to pay **4-MALI**'s claim.

ISSUE NUMBER TWO: Did the Trial Court err in granting appellee, Banker's Insurance Company's Motion for Summary Judgment, finding that appellant, 4-MALI L.L.C. did not submit a timely Proof of Loss Statement, when Bankers made an unconditional tender for other damages with knowledge that appellant intended to seek recovery of shelf moving expenses?

Exhibits attached to **BANKERS'** Motion for Summary Judgment clearly indicates that **4-MALI** attached removal and resetting of content estimates to the timely filed 1st "Partial Proof of Loss". For **BANKERS** to now claim that a certified sworn Proof of Loss form was not timely submitted for this amount is absolutely contrary to the facts herein. The fact that **BANKERS** sought a coverage opinion from the NFIP Statistical Agent for the removal and resetting of contents defeats their argument that they were not put on notice of the claim. Surely this Honorable Court can recognize that a formal technicality should not act as a bar to an otherwise meritorious claim.

The issue of timely submission of documentation was confronted in the *S.A. Burns v. Federal Emergency Management Agency, 84 F. SUPP.2d 839 (S.D. Texas 2000)* case. Judge Kent held that the claimants in a Federal Flood claim had timely submitted bills, expenses, receipts and related documentation to the Federal Emergency Management Agency (hereinafter "FEMA"), and FEMA's Motion for Summary Judgment, based on an alleged failure to comply with the SFIP proof of loss provisions, was denied. The Court held that an issue of fact existed as to whether the insured had complied with the certified

Proof of Loss Statement requirements, and the Court "strongly urged" both parties to concentrate on the prompt resolution of the true controversy in the case, which was the plaintiff's damages. FEMA did not claim that the plaintiff's Proof of Loss was not timely filed or adequate, but claimed that the claimant failed to furnish "all bills, receipts and related documents" to FEMA within sixty (60) days of the date of loss, which the Court ruled had no merit.

BANKERS' refusal to pay **4-MALI**'s otherwise meritorious claim is the sole motivation for them to claim that a Certified Sworn Proof of Loss Statement was not prepared and submitted, when their own actions refute this claim. Only upon learning that **BANKERS** intended for the first time to rely on **4-MALI**'s failure to timely submit a proof of claim, in the opposition to **4-MALI**'s Motion for Summary Judgment filed in November 2002, did **4-MALI** seek an Article 8(D) Waiver from the Federal Insurance Administrator of the requirement that a certified Proof of Loss be submitted within sixty (60) days of the claim. Up to that point, **BANKERS** had solely rested its defense on the fact that there was allegedly no coverage for the removal and resetting of contents at **4-MALI**'s Lessees' premises. **4-MALI** attached the removal and resetting estimate to their original "1st Partial" Proof of Loss submitted in August 2000, and again referenced their pending claim in the "2nd Partial" Proof of Loss submitted in September 2000, (which was submitted after the running of the 60 day period and was paid by **BANKERS**). **4-MALI** had absolutely no reason to believe that **BANKERS** would rely on their alleged failure to timely submit a Proof of Claim until **BANKERS** filed their Opposition to **4-MALI**'s Motion

for Summary Judgment.

While **BANKERS** argues that an "estimate" is not a "Proof of Loss" Statement, no argument has been made that the estimates were not attached to both the "First Partial" and the "2nd Partial" Proofs of Loss submitted by **4-MALI**. Clearly, this material issue of fact alone is sufficient to defeat **BANKERS**' Motion for Summary Judgment.

CONCLUSION

BANKERS real argument is that there is no coverage for the removal and resetting of contents at **4-MALI**'s Lessees' premises. However, there is absolutely no provision in the SFIP that such expenses are not covered. In fact, several SFIP Articles indicate that the removal and resetting of shelving is covered. First, it must be made clear that the claim does not encompass damages to any items which are located on the shelves. In fact, the only expense associated with the removal and resetting is the labor involved in such removal and resetting. **BANKERS** cites Article 3 of the SFIP which allegedly indicates that there will be no coverage due to "any other economic loss".

In reading the entire NFIP, there is absolutely no provision which excludes reimbursement for the removal and resetting of contents when repairs need to be made to a flooring area. If the best that **BANKERS** can do is a throw away "any other economic loss" exclusion, then it is clear that the NFIP is vague and ambiguous, and that Summary Judgment should never have been granted **BANKERS** based on vague and ambiguous language.

BANKERS further attempts to exclude coverage based on the fact that the shelving and their contents were not owned by **4-MALI**. However, it is clear that **4-MALI** is not seeking reimbursement for any items damaged by the flood which were owned by its lessees, but simply seeks reimbursement of labor costs related to the removing and resetting of contents. This is clearly covered by the NFIP, and it is respectfully requested that the Summary Judgment granted on behalf of **BANKERS** be overturned, and that Summary Judgment on behalf of **4-MALI** should be granted.

Respectfully Submitted,

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
ALEXANDRIA DIVISION

4-MALI	**Civil Action No. 01-1184**
-vs-	**SECTION "A" (JUDGE LITTLE)**
BANKERS INSURANCE COMPANY	

JUDGMENT

For Written Reasons set forth on this date, the Motion for Summary Judgment filed by defendant Bankers Insurance Company is GRANTED {Doc. No. 27}. The Motion for Summary Judgment filed by plaintiff 4-Mali, LLC is DENIED {Doc. No. 13}. In addition, plaintiff 4-Mali, LLC's claim against Bankers Insurance Company is DISMISSED WITH PREJUDICE. Each party to bear its own costs.

Alexandria, Louisiana
28 April 2003

F. A. LITTLE, JR.
UNITED STATES DISTRICT JUDGE
JUDGMENT ENTERED
April 28, 2003
Copy: Auzenne - Nielson

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
ALEXANDRIA DIVISION

4-MALI	**Civil Action No. 01-1184**
-vs-	**SECTION "A" (JUDGE LITTLE)**
BANKERS INSURANCE COMPANY	

MEMORANDUM

Plaintiff 4-Mali, LLC and defendant, Bankers Insurance Company, each have filed Motions for Summary Judgment in this matter concerning coverage under the National Flood Insurance Program. Each party opposes the other's Motion. The Motions have been consolidated for consideration. The defendant, Bankers Insurance Company's Motion for Summary Judgment is granted {Doc. No. 23}. The plaintiff 4-Mali, LLC's Motion for Summary Judgment is denied {Doc. No. 13}.

BACKGROUND

Plaintiff, 4-Mail, LLC ("4-MALI") owns a shopping center, known as the Power Center, in Alexandria, Louisiana. 4-Mali leases properties in the Power Center to Hobby Lobby, Office Depot, and the Alexandria Furniture Outlet ("Lessees). 4-Mali purchased a Standard Flood Insurance Policy (SFIP) from Bankers Insurance Company ("Bankers"). Bankers is a Write-Your-Own carrier participating in the United States Government's National Flood Insurance Program (NFIP). See 42 U.S.C., § 4001 et seq.

On or about 27 June 2000, the Lessees' properties were flooded and damaged. 4-Mali hired Paul Davis Restoration ("Restoration") to relocate shelves, described as "remove and reset contents" on Restoration's invoice, totaled $101,185.46 for the three stores. 4-Mali filed a claim for this amount from

Bankers.

Bankers denied 4-Mali's claim for relocating the shelves of the Lessees, stating that this cost was not covered by the SFIP policy. Bankers has paid 4-Mali $225,518.06 for other costs incurred from the flood damage.

In its Motion for Summary Judgment, 4-Mali asserts that the Bankers General Property Policy issued through the NFIP does not exclude the cost of removing and resetting the contents of the Lessees' stores. 4-Mali seeks payment of the $101,185.46 for relocating the shelves in the three stores.

Bankers likewise seeks Summary Judgment, stating that the SFIP must be strictly construed and does not cover the cost of relocating the Lessees' shelves. Bankers also contends that regardless of the SFIP's coverage, 4-Mali has failed to comply with procedural requirements and may not recover the cost

of relocating shelves.

STANDARD OF REVIEW

Summary Judgment may be granted to the moving party only if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, when viewed in the light most favorable to the non-moving party, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56; **Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-50 (1986).** A dispute about a material fact is genuine if the evidence is such that a reasonable jury could return a verdict for the non-moving party. **Anderson, 477 U.S. at 248.** In making this determination, a Court must draw all justifiable inferences in favor of the non-moving party. **Id. at 255.** Once the moving party has shown "that there is an absence of evidence to support the non-

moving party's case," the non-moving party must come forward with "specific facts" showing a genuine factual issue for trial. **Fed. R. Civ. P. 56;** Celotex Corp. v. Catrett, **477 U.S. 317, 325 (1986).** Conclusory denials, improbable inferences, and legalistic argumentation are not an adequate substitute for specific facts showing that there is a genuine issue for Trial. S.E.C. v. Recile, **10 F.3d 1093, 1097 (5th Cir. 1993).**

DISCUSSION

4-Mali argues there is an ambiguity in the Bankers policy regarding coverage for the cost of relocating shelves, a cost which, 4-Mali points out, was a prerequisite to completing other necessary, covered repairs. 4-Mali asserts there is no provision in the policy specifically excluding coverage for relocating shelves and finds several provisions in the policy that could include shelf-relocating costs. According to plaintiff, these costs could fall within provisions

covering Improvements or Building Property.

In addition to arguing that no provision in the SFIP includes the cost of relocating shelves, Bankers contends that 4-Mali did not submit a Proof of Loss Statement as required by the SFIP. Specifically, Article 8(O)(3) requires an insured to submit to the insurer a signed and sworn Proof of Loss within sixty days after a loss occurs. The Proof of Loss must include, *inter alia*, an explanation of how the loss occurred and set forth the insured's ownership interest in the damaged property.

4-Mali concedes in its Opposition Memorandum that an estimate for the cost of relocating shelves was submitted to Bankers on 1 August 2000. Plaintiff asserts the estimate put Bankers on notice that 4-Mali would seek reimbursement for this cost. 4-Mali also states it is seeking an Article 8(D) Waiver of the sixty-day Proof of Loss requirement from the Federal

Insurance Administration (FIA). There is no additional information regarding the status of this waiver application. The real issue, according to plaintiff, is whether the SFIP provides coverage for the cost of relocating shelves.

Bankers counters that the cost of relocating shelves is not covered because the SFIP Policy applies only to property owned by 4-Mali; the shelves are owned by the Lessees, who are not named insureds under the SFIP. According to defendant, the shelves should be treated as the goods of a bailee. The SFIP covers Building Property owned by an insured but explicitly precludes coverage for a bailee's goods. Bankers cites 4-Mali's failure to comply with the Proof of Loss requirements of Article 8(O)(3) as another basis for denying coverage for the shelf-relocation costs.

It is not clear from the terms of the SFIP that the cost of relocating the Lessees' shelves is a covered

expense. It is clear, however, that an insured must comply with the Proof of Loss requirements as set forth in Article 8(O)(3). Plaintiff states it provided Bankers with an estimate of the costs of shelf relocation, but this estimate is no substitute for an insured's obligation to provide a sign and sworn Proof of Loss. Giving notice of a loss and providing a Proof of Loss within the sixty-day time frame "are separate and distinct requirements of the policy." Gowland v. Aetna, 143 F.3d 951, 954 (5th Cir. 1998) The provisions of an insurance policy issued pursuant to a federal program must be strictly construed and enforced. Id. The failure to provide a Proof of Loss Statement as outlined in Article 8(O)(3) precludes coverage under the SFIP. See id. at 953-54.

Plaintiff's statement that it is seeking an FIA waiver of the sixty-day Proof of Loss requirement appears to be an admission that 4-Mali did not adhere to the Proof of Loss requirements set forth in Article

8(O)(3). Although there is no provision excluding coverage for shelf relocation, plaintiff can point to no provision that includes this expense as a covered cost. Furthermore, plaintiff provides no convincing reasons why shelf relocation should be included within policy provisions covering Improvements and Building Property.

CONCLUSION

Because the plaintiff has not shown that its claimed costs are covered by the SFIP and has not complied with the policy's Proof of Loss requirements, the defendant's Motion for Summary Judgment is granted. Each party shall bear its own costs.

Alexandria, Louisiana
28 April 2003

F. A. LITTLE, JR.
UNITED STATES DISTRICT JUDGE
COPY SENT
4/28/03
To: Auzenne / Nielson

UNTIED STATES COURT OF APPEALS

FIFTH CIRCUIT
OFFICE OF THE CLERK

CHARLES R. FULBRUGE, III
Clerk
Tel. 504-310-7700
600 Camp Street
New Orleans, LA
70130

October 6, 2003

IMPORTANT NOTICE

TO ALL COUNSEL LISTED BELOW

No. 03-30460 4-MALI v. Bankers Insurance Co
Projected Week of Hearing **12/01/03**

Dear Counsel:

We have tentatively scheduled this case for oral argument during the week shown.

If you have a serious, irresolvable conflict, contact us **IMMEDIATELY**. Do not ask to reschedule argument unless you can find no other solution. **GENERALLY, ENGAGEMENT OF COUNSEL IN ANOTHER COURT IS NOT AN "IRRESOLVABLE CONFLICT."**

So we can provide all pertinent information to the court before argument, and barring an emergency, we must receive all additional filings by noon on the workday immediately preceding argument.

If you are arguing before the Fifth Circuit for the first time, please visit our Internet site at "http:www.ca5.uscourts.gov/documents/handout.htm" for "Preparing for Oral Argument in the Fifth Circuit" and at "http:www.ca5.uscourts.gov/documents/ltsig-e.htm" for "Notice to Counsel Attending Oral Argument". If you do not have Internet access, please call and we will send you the information.

Counsel are advised it is almost invariably more helpful, in lieu of large exhibits, to furnish the courtroom deputy four smaller sized (not larger than about 8x14 inches) copies of charts, diagrams, etc., for the judges' use. If counsel believe it necessary to use large exhibits, please also furnish the small copies.

CALENDERING DEPARTMENT
504-310-7804

/gam

Mr. Stacy C. Auzenne
Mr. Gerald Joseph Nielson

PROJ-WK

UNTIED STATES COURT OF APPEALS

FIFTH CIRCUIT
OFFICE OF THE CLERK

CHARLES R. FULBRUGE, III
Clerk
Tel. 504-310-7700
600 Camp Street
New Orleans, LA
70130

November 24, 2003

IMPORTANT NOTICE

TO ALL COUNSEL OF RECORD
No. 03-30460 4-MALI v. Bankers Insurance Co

Dear Counsel:

The panel to whom the above referenced case was assigned has determined under FRAP 34(a) that oral argument will not be required in this case. Therefore, counsel need not appear for argument on Wednesday, December 3, 2003.

The case will be decided in due course on the record and briefs on file.

Please acknowledge receipt on the attached copy of this letter.

Very truly yours,
CHARLES R. FULBRUGE, III,
Clerk
By: _____
Valerie L. Bellanger
Assistant Calender Clerk/
Courtroom Deputy

session #18
Mr. Stacy Auzenne
Mr. John Nielson

United States Court of Appeals
Fifth Circuit
FILED
December 11, 2003

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 03-030460

4-MALI L.L.C.,
Plaintiff-Appellant,

versus

BANKERS INSURANCE COMPANY
Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Louisiana
USDC No. 01-CV-1184

Before GARWOOD, JOLLY and CLEMENT, Circuit Judges.

PER CURIAM:

4-Mali L.L.C. ("4-Mali") appeals the District Court's Judgment dismissing its complaint claiming flood insurance coverage. The District Court held that 4-Mali's claims were not covered by a Standard Flood Insurance Policy ("SFIP"), and that, in any event, 4-Mali had failed to comply with the SFIP's procedural requirements. We hold that the District Court did not

err in finding that 4-Mali's failure to provide a Proof of Loss Statement within sixty days of the flood precludes coverage. See Gowland v.Aetna, 143 F.3d 351, 953-54 (5th Cir. 1998). As such, we need not evaluate the scope of the SFIP's coverage. The Judgment of the District Court is therefore

AFFIRMED.

Pursuant to 5th Cir. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4

UNTIED STATES COURT OF APPEALS

FIFTH CIRCUIT
OFFICE OF THE CLERK

CHARLES R. FULBRUGE, III
Clerk
Tel. 504-310-7700
600 Camp Street
New Orleans, LA
70130

November 24, 2003

IMPORTANT NOTICE

MEMORANDUM TO COUNSEL OF PARTIES LISTED BELOW

Regarding: Fifth Circuit Statement on Petitions for Rehearing or Rehearing En Banc

No. 03-30460 4-MALI v. Bankers Insurance Co
USDC No. 01-CV-1184

Enclosed is a copy of the Court's decision. The Court has entered Judgment under FED. R. App. P. 36. (However the opinion may yet contain typographical or printing errors which are subject to correction.)

FED. R. APP. P. 39 through 41, and 5th CIR. RULES 35, 39, and 41 govern costs, rehearings, and mandates. **5th CIR. RULES 35 and 40 require you to attach to your Petition for Panel Rehearing or Rehearing En Banc an unmarked copy of the Court's opinion or Order.** Please read carefully the Internal Operating Procedures (IOP's) following FED. R. APP. P. 40 and 5th CIR. R. 35 for a discussion of when a rehearing may

be appropriate, the legal standards applied and sanctions which may be imposed if you make a nonmeritorious Petition for Rehearing en banc.

Direct Criminal Appeals. 5TH CIR. R. 41 provides that a Motion for a Stay of Mandate under FED. R. APP. P. 41 will not be granted simply upon request. The Petition must set forth good cause for a Stay or clearly demonstrate that a substantial question will be presented to the Supreme Court. Otherwise,, this Court may deny the Motion and issue the mandate immediately.

Pro Se Cases. If you were unsuccessful in the District Court and/or on Appeal, and are considering filing a Petition for certiorari in the United States Supreme Court, you do not need to file a Motion for Stay of mandate under FED. R. APP. P. 41. The issuance of the mandate does not affect the time, or your right, to file with the Supreme Court.

The Judgment entered provides that appellant pay to appellee the costs on Appeal.

Sincerely,

CHARLES R GULBRUGE, III, Clerk

By: _____ _____
Rhonda Flowers, Deputy Clerk

Enclosure
Mr. Stacy C. Auzenne
Mr. Gerald Joseph Nielson
Mr. John Dennis Carter

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 03-030460

4-MALI L.L.C.,
Plaintiff-Appellant,

v.

BANKERS INSURANCE COMPANY
Defendant-Appellant

Appeal from the United States District Court for the Western District of Louisiana, Alexandria

---

ON PETITION FOR REHEARING

Before GARWOOD, JOLLY and CLEMENT, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the Petition for

Rehearing is **DENIED**

ENTERED FOR THE COURT:

United States Circuit Judge
January 14, 2004

REHG-2

4-MALI, L.L.C.
Post Office Box 13702
Alexandria, Louisiana 71315-3702
Telephone: 1-318-445-2097
Facsimile: 1-318-448-1902

June 14, 2000
TELECOPIER COVER LETTER

TIME:	**5 PM**	**DATE:**	**8-14-00**
TO:	**Jim Aldridge**	**Fax Number: 727-738 1460**	
FROM: Gene Cicardo, Jr. Attorney at Law		**RE:** Power Center	
We are sending 4 pages		Original to Follow Via U. S. Mail _____ yes ___x____ No	

IF YOU DO NOT RECEIVE ALL PAGES, PLEASE CALL 318-445-2097 AS SOON AS POSSIBLE. FAX NUMBER 318-448-1902.

* *

CONFIDENTIALITY NOTICE

THE DOCUMENTS ACCOMPANYING THIS TELECOPY TRANSMISSION CONTAIN CONFIDENTIAL INFORMATION BELONGING TO THE SENDER WHICH IS LEGALLY PRIVILEGED. THE INFORMATION IS INTENDED ONLY FOR THE USE OF THE INDIVIDUAL OR ENTITY NAMED ABOVE. IF

YOU ARE NOT THE INTENDED RECIPIENT, YOU ARE HEREBY NOTIFIED THAT ANY DISCLOSURE, COPYING, DISTRIBUTION OR TAKING OF ANY ACTION IN RELIANCE ON THE CONTENTS OF THIS TELECOPIED INFORMATION IS STRICTLY PROHIBITED. IF YOU HAVE RECEIVED THIS TELECOPY IN ERROR, PLEASE IMMEDIATELY NOTIFY US BY TELEPHONE TO ARRANGE FOR RETURN OF THE ORIGINAL DOCUMENTS TO US.

* *

4-MALI, L.L.C.
Post Office Box 13702
Alexandria, Louisiana 71315-3702

Telephone: 1-318-445-2097
Facsimile: 1-318-448-1902

August 14, 2000

Mr. Jim Aldridge
Catastrophe Division
P. O. Box 33061
St. Petersburg, FL 33733-8064

VIA FACSIMILE
727-738-1460

RE: 4-Mali, LLC and Power Center, 1804 MacArthur Drive, Alexandria, Louisiana

Dear Mr. Aldridge:

Enclosed please find a copy of letter we have sent to our adjustor regarding this claim. Further, this will confirm our conversation and the letter I received from you by fax allowing us to negotiate the check sent to us with no prejudice. This means that our negotiation of this check will not prohibit us from claiming any further expenses which, as you can see, we have done.

Further, we are to consider this check as an unconditional tender with no strings attached. If this is not your understanding, please notify me immediately. If I have not heard from you by noon, August 15, 2000, I will assume everything in this letter is correct and then negotiate the check with no fear that this concludes our claim.

Thanking you for your courtesies in this matter, I am

Yours very truly,
Eugene P. Cicardo, Jr.

EPCjr/dq
Enclosure

4-MALI, L.L.C.
Post Office Box 13702
Alexandria, Louisiana 71315-3702

Telephone: 1-318-445-2097
Facsimile: 1-318-448-1902

June 14, 2000

TELECOPIER COVER LETTER

TIME: 4:55 PM	**DATE: 8-14-00**
TO: Lisa Babcock	**Fax Number: 504-649-3229**
FROM: Gene Cicardo, Jr. Attorney at Law	**RE:** Power Center
We are sending 14 pages	Original to Follow Via U. S. Mail _____ yes ___x____ No

IF YOU DO NOT RECEIVE ALL PAGES, PLEASE CALL 318-445-2097 AS SOON AS POSSIBLE. FAX NUMBER 318-448-1902.

* *

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YOU ARE NOT THE INTENDED RECIPIENT, YOU ARE HEREBY NOTIFIED THAT ANY DISCLOSURE, COPYING, DISTRIBUTION OR TAKING OF ANY ACTION IN RELIANCE ON THE CONTENTS OF THIS TELECOPIED INFORMATION IS STRICTLY PROHIBITED. IF YOU HAVE RECEIVED THIS TELECOPY IN ERROR, PLEASE IMMEDIATELY NOTIFY US BY TELEPHONE TO ARRANGE FOR RETURN OF THE ORIGINAL DOCUMENTS TO US.

****

4-MALI, L.L.C.
Post Office Box 13702
Alexandria, Louisiana 71315-3702
Telephone: 1-318-445-2097
Facsimile: 1-318-448-1902

August 14, 2000

Liz Babcock
Adjustor
Banker's Insurance Company

VIA FACSIMILE
504-649-3229

RE: 4-Mali, LLC and Power Center, 1804 MacArthur Drive, Alexandria, Louisiana

Dear Lori:

Pursuant to our various conversations, enclosed please find the estimate for the tile, based and drywall from Paul Davis Restoration.

Our main contention of differences are as follows:

1. Price per sq. ft. for/or carpet ($2.65); tile ($2.52); & base molding ($1.37)

2. In your estimate of the main area of Office Depot, you show 12,465 sq. ft. of vinyl tile flooring. According to our estimate, the main floor area is 17,103 sq. ft.

3. In the main floor area of Office Depot, the carpet turns up the wall which is connected to the carpet on the floor. This was left out of you estimate.

4. You failed to include debris removal/dumpster in your estimate.

5. Basically, we have no problem with your depreciation expense charged to us; however, we do object to any depreciation be

taken for Alexandria Furniture. As we discussed, Alexandria Furniture. As we discussed, Alexandria Furniture was completed and opened for business on January 15, 2000. This construction is brand new construction. We feel that no depreciation had accrued in the short time between when it was completed and this flood.

Our final contention is that to remove and replace the tile needed, we have to move the shelving and contents in the various stores. As you are aware, none of the contents were damaged and we are not claiming any damage for contents. However, we are claiming that in order to remove and replace the tile that was damaged, as you can see from our estimate, will cost us almost $100,000.

We feel that this is not a contents claim and that it goes into the costs of removing and replacing the flooring which was damaged; otherwise, our tenants would have claims against us for loss of business which

would far exceed the sums requested.

If you have any questions or car to discuss any of the details in this letter, please do not hesitate to contact me.

Thanking you in advance for your courtesies, I am

Yours very truly,

Eugene P. Cicardo, Jr.

EPCjr/dq

cc: Mr. Jim Aldridge

BANKERS
INSURANCE GROUP

BANKERS INSURANCE COMPANY
P.O. Box 33061 St. Petersburg, FL 33733-8061

January 4, 2001

4-MALI, LLC
PO BOX 12446
ALEXANDRIA, LA 71315-2446

RE:	Insured:	4-MALI, LLC
	Claim#	BI 1-00-11537
	Policy#	17-0007677947
	Date of Loss:	6-27-00

Dear Sirs:

I do apologize about the delay in getting these letters to you. I hope this resolves your question about the shelving.

If you care to discuss this, please give me a call at 1-800-725-9472, extension 3028.

Very truly yours,

Jim Aldridge
Claim Representative

Enclosures
Letter to NFIP
Response from NFIP

JA/pj

P. O. Box 33061/St. Petersburg, FL 33733-8061
Policy Information 727-823-4000/1-800-627-0000
Claims 727-894-3565/1-800-765-9700

NATIONAL FLOOD INSURANCE PROGRAM
BUREAU AND STATISTICAL AGENT

December 13, 2000

Bankers Insurance Company
Attn: Jim Aldridge, Claim Representative
P. O. Box 33061
St. Petersburg, FL 33733-8061

In Re:	Insured:	4-MALI, LLC
	Claim#	BI 1-00-11537
	Date of Loss:	6-27-00
	Policy#	17-0007677947

Dear Mr. Aldridge:

After reviewing your letter, and speaking with you, I have to agree with your assessment of coverage under the Standard Flood Insurance Policy (SFIP).

Because you insure the building and because the shelves are not permanently installed or owned by your insured, the SFIP you issued will not pay to remove and reinstall them, even though that is necessary to make building repairs. If the tenants have coverage, the cost would be acceptable under their tenant's policy.

I hope this clarifies the coverage question you are having with this claim. If you need additional information please let me know.

Thank you:

Joseph Buzzelli, Claim Manager
NFIP Bureau & Statistical Agent

**7700 Hubble Drive - Lanham, MND 20706 *
(301) 731-5300**

COMPUTER SCIENCES CORPORATION, under contract to the FEDERAL EMERGENCY MANAGEMENT AGENCY, is the Bureau and Statistical Agent for the National Flood Insurance Program

BANKERS
INSURANCE GROUP

BANKERS INSURANCE COMPANY

P.O. Box 33061 St. Petersburg, FL 33733-8061
November 27, 2000
NATIONAL FLOOD INSURANCE PROGRAM
ATTN: DON WATERS
7700 HUBBLE DRIVE **DROP FILE**
LANHAM, MD 20706

In Re:	Insured:	4-MALI, LLC
	Claim#	BI 1-00-11537
	Date of Loss:	6-27-00
	Policy#	17-0007677947

Dear Mr. Walters:

I had previously written to the National Flood Insurance Program offices about this loss and have not received a response. The insured is calling and I need to provide them with a response. I have already declined the coverage, but they wanted a confirmation from you that I am right or wrong.

The insured is a mall and there are several rented spaces with floor shelving that will need to be moved to have access to the floors so that the floor tile can be replaced.

Since the insured does not own these shelves, I do not see how we can pay for them under the building policy (general policy). The tenant policy might pay to move them, if they were damaged by the flood. This could come under the building improvement and alterations.

These are portable shelves that would go with the tenant when they leave.

Thank you for your assistance. I will look forward to your reply.

Very truly yours,
Jim Aldridge
Claim Representative
JA/PJ
cc: 4-Mali LLC